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No. 97-1714

In The

Supreme Court of the United States

October Term, 1997

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SUPREME COURT, U.S.

THEODORE P. COATES,

Petitioner,

vs.

KENNETH M. SEATON,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Colorado

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner has properly asserted the jurisdiction of the United States Supreme Court.

2. Whether a case or controversy exists.

3. Whether the Fair Debt Collection Practices Act applies to this case.

4. Whether the Tennessee Judgment would be void even if the Fair Debt Collection Practices Act did apply to this case.

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ARGUMENT WHY CERTIORARI SHOULD BE DENIED

I. Jurisdiction

1. Petitioner, under the section entitled, "Jurisdiction", of pg. 1 of his Petition For Writ Of Certiorari, states:

> The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

2. 28 U.S.C. § 1254 applies only to appeals from a Federal Court of Appeals and not to appeals from a State Court of Appeals.

3. The "Question Presented For Review" set forth on page ii of the Petitioner's Petition For Writ Of Certiorari is:

> Whether the full faith and credit clause requires Colorado to enforce a Tennessee judgment obtained in a lawsuit on a consumer debt where the Tennessee judgment was obtained in violation of the Fair Debt Collection Practices Act provision requiring that such lawsuit be brought in Colorado.

4. The question which the Petitioner seeks to present before the United States Supreme Court for review does not fall within those questions set forth in 28 U.S.C. § 1257, which governs which final judgments or decrees of the highest court of a State the United States Supreme Court will review. 28 U.S.C. § 1257 provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held to authority exercised under, the United States.

II. No Case Or Controversy

1. In both his Opening Brief Of Appellant, pg. 3, filed with the Colorado Court Of Appeals on October 17, 1996, and Petition For Writ Of Certiorari to the United States Supreme Court, pg. 5, the Petitioner states:

> Mr. Coates, it should be mentioned, is not questioning or attacking the propriety or validity of any underlying debt owing by him to Mr. Seaton.

2. The Petitioner has acknowledged the propriety and validity of the underlying debt owing by him to the Respondent and, therefore, there is no real and substantial controversy between the parties. Because the Petitioner has acknowledged the propriety and validity of the underlying debt owing by him to the Respondent, the "Question Presented For Review" set forth on page ii of the Petitioner's Petition For Writ Of Certiorari becomes moot and its determination would be for academic purposes only.

3. As provided in *Aetna Life Inc. Co. v. Haworth*, 300 U.S. 227, 240 (1937):

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (cit. del.)

4. The test, as framed in *Baker v. Carr*, 369 U.S. 186, 204 (1961), is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

5. In *Williams v. Simons*, 355 U.S. 49, 57 (1957), Justice Douglas wrote a Memorandum which provided, in part:

> This Court is empowered by the Constitution to decide cases and controversies. U.S. Const., Art. III, Sec. 2. A cause that has become moot is not a case or controversy in the constitutional sense. We cannot underscore this principal too heavily.

III. The Fair Debt Collection Practices Act Has No Application To This Case.

1. 15 U.S.C. § 1692a(5) provides:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for **personal, family, or household purposes**, whether or not such obligation has been reduced to judgment. (emp. add.)

A. The claim which the Respondent originally brought against the Petitioner in the Chancery Court For Knox County, Tennessee, was based upon a Promissory Note which the Petitioner had executed in favor of the Respondent and which the Petitioner then defaulted upon.

B. The Promissory Note was solely for business purposes and not for personal, family, or household purposes and was, therefore, not subject to the Fair Debt Collection Practices Act. That the Promissory Note was solely for business purposes and not for personal, family, or household purposes is confirmed by the excerpts from the record which follow, and from the fact that the Promissory Note was, itself, marked for "business use" on its face.

C. In the fourth paragraph under section II, pg. 2, of the Petitioner's Notice Of Appeal filed with the Colorado Court Of Appeals on or about July 21, 1994, the Petitioner acknowledges that the funds which the Respondent lent to the Petitioner were to finance the Petitioner's limited

partnership interest in an apartment house complex, and states:

> In 1982, Mr. Coates and several other Colorado residents signed a series of promissory notes and related loan documents in connection with their respective investments in an apartment house complex in Knoxville, Tennessee.

D. The Promissory Note, attached to the Respondent's Complaint filed in the Chancery Court for Knox County, Tennessee, provides, on page one:

> *DISPOSITION OF PROCEEDS*: The proceeds of this loan will be used for personal, family or household [ ]; agricultural [ ]; or business [X] use (check one).

The "business" use and *not* the "personal, family or household" use box was checked by the Petitioner.

E. In paragraph 8, pgs. 2-3, of the Petitioner's Answer filed with the Chancery Court for Knox County, Tennessee, the Petitioner acknowledges that the subject matter of the Promissory Note was the Defendant's limited partnership interest in Tanglewood Apartments, Ltd.

F. In paragraph 14, pg. 2, of the Petitioner's Answer, the Petitioner acknowledges that:

> The Restated Certificate of Limited Partnership Agreement of Tanglewood Apartments, Ltd. ("Tanglewood" or the "Partnership") dated as of July 1, 1982 (the "Partnership Agreement") is the agreement upon which the within causes of action are based and was entered into and was to have been performed in Knoxville, Knox County, Tennessee.

G. In paragraph 1 of the Petitioner's Response To Notice Of The Filing Of A Foreign Judgment, Verified Motion To Vacate Foreign Judgment And Request For Stay Of Enforcement Thereon filed with the District Court of Arapahoe County, Colorado, on or about July 1, 1993, the Petitioner Acknowledges that:

> The Tennessee promissory note was a purchase money note secured by a limited partnership interest in Tanglewood Apartments, Ltd., a Tennessee Limited Partnership (the "Partnership"). Plaintiff was at all times material to this case, the general partner of the Partnership. Defendant was a limited partner until the Plaintiff foreclosed his security interest in the Defendant's limited partnership interest, the collateral securing the note in July, 1990.

This is clearly an acknowledgment that the debt was a business debt which would not fall within the purview of the Fair Debt Collection Practices Act.

2. Even if the underlying transaction were found to be a "debt" within the meaning of the Fair Debt Collection Practices Act, the Respondent was not a "debt collector" within the meaning of the Act.

A. 15 U.S.C. § 1692a(6) provides, in part, that:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

B. The sole basis upon which the Petitioner alleges that the Respondent is a "debt collector" within the meaning of section 1692a(6) is that in 1998, the Respondent had purchased approximately 18 promissory notes from the Federal Deposit Insurance Corporation as part of a transaction in which the Respondent paid off his debt to the Federal Deposit Insurance Corporation. As the Petitioner stated in paragraph A of section I, pg. 1, of his Defendant's Memorandum Of Points And Authorities In Support Of A Previously Filed Motion To Vacate A Foreign Judgment filed with the District Court Of Arapahoe County, Colorado, on or about April 7, 1994:

> Plaintiff's claims against Defendant originated when Plaintiff acquired a package of defaulted promissory notes from the FDIC pursuant to a "Note Purchase Agreement" and related "Settlement Agreement" dated October 20, 1988 by and between Plaintiff and the FDIC (see Exhibit A and B hereof). As part of a larger transaction in which Plaintiff paid off indebtedness he owed to the FDIC, the FDIC transferred to the Plaintiff at least eighteen (18) defaulted Notes described in the October 20, 1988 Note Purchase Agreement and related Settlement Agreement. Defendant's Promissory Note was acquired by Plaintiff as part of the package of defaulted notes Plaintiff acquired from FDIC.

C. No where in the record does the Petitioner allege that the Respondent was engaged in any additional or other activities which would constitute a "business the principal purpose of which is the collection of any debts", or which would indicate that the Respondent, "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another".

D. The isolated instance of the Respondent's purchase of approximately 18 notes from the Federal Deposit Insurance Corporation as part of a transaction whereby the Respondent paid off his debt to the Federal Deposit Insurance Corporation, is not sufficient, in and of itself, to establish that the Respondent engaged in a "business the principal purpose of which is the collection of any debts" or that the Respondent "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

E. Even were the Respondent found to be a "debt collector" within the meaning of the Fair Debt Collection Practices Act, the Fair Debt Collection Practices Act would still not apply because the debt was a business debt and not a consumer debt.

3. During a hearing in open Court held in the District Court of Arapahoe County, Colorado, on April 8, 1994, on the Petitioner's Response To Notice Of The Filing Of A Foreign Judgment, Verified Motion To Vacate Foreign Judgment And Request For Stay Of Enforcement Thereon, the Court addressed the issue of whether or not the Fair Debt Collection Practices Act applied to this case. The Arapahoe County District Court found that the Fair Debt Collection Practices Act did **not** apply to this case. As set forth in section II, pg. 4, of his Defendant's Rule 59 Motion filed with the District Court Of Arapahoe County, Colorado, on or about April 26, 1994, the Petitioner states, "In its decision rendered April 8, the Court held that Mr. Coates' obligation was, as a matter of law, not "debt" under the Federal Act." In his Notice Of Appeal filed with the Colorado Court Of Appeals on or about May 1, 1994, the Petitioner, at pg. 3, states, "The trial court ruled

that as a matter of law Mr. Coates could not under any circumstances bring himself within the protection of either the Federal Act or the Colorado Act", and at pg. 5, lists as an issue to be determined, "Whether the District Court erred as a matter of law in concluding that Mr. Coates' debt to Mr. Seaton, because the Court held that it was not a consumer debt under the Federal Act, could not be a consumer debt under the Colorado Act."

4. As set forth in pages 10 and 11 of the transcript of the hearing of April 8, 1994, made part of the record in Petitioner's appeal to the Colorado Court of Appeals, in volume II of the record, The District Court of Arapahoe County made a finding that:

> The facts in this case, the Federal Fair Debt Collection Act, which would both by the terms of the note and of course as a matter of law pre-empt the Tennessee Act provides under 1692(a) that a debt that is covered by the Act is one which is primarily for personal, family or household purposes, and that unless the debt is one which falls within that category, the Act is not applicable. That does not include investments into partnership entities which are made for investment purposes and are limited partnership investments, and the Court cites in that support *Bloom*, and it would have been appropriate for either counsel to have determined whether it was a debt under the Act.
>
> The Court did its own research. *Bloom v. I.C. Systems, Inc.*, which is a Ninth Circuit case, 1992, is found at 972 F.2d 1067, in which the Ninth Circuit noted that a business loan for investment, in that case a software company, was not a

consumer debt and therefore the Act was not applicable.

The Court further notes *National Union Fire Insurance Company versus Hartel,* which is from the Southern District of New York, 1990, which noted that a note used to pay for a portion of an investor's partnership interest is not a consumer debt under the Act and therefore the Federal Act is not applicable. And in that particular case the Court cites at page 1140, looks like about half-a-dozen other cases with a similar holding, including one out of the Tenth Circuit.

This is an investment. This was a-hundred-plus-thousand dollar or something investment in a limited partnership which held real property. It is not a mobile home purchase, such as the other cases; it is not a consumer credit card department store credit card case; it is not a consumer debt. Thus, the Federal Act is inapplicable; further, even if the Federal Act was not inapplicable, the provision in the act is one of venue by its terms, not personal jurisdiction.

5. On May 1, 1996, the Petitioner appealed the ruling of the Arapahoe County District Court to the Colorado Court Of Appeals and, in its decision of May 15, 1997, the Colorado Court Of Appeals affirmed the judgment of the Arapahoe County District Court.

6. The Petitioner asserted the application of the Fair Debt Collection Practices Act to this case and motioned the Court for a dismissal of the action as a result of a violation of 15 U.S.C. § 1692i, in his Special Appearance For The Purpose Of Challenging Personal Jurisdiction dated October 10, 1989, and in his Special Appearance For The Purpose Of Challenging Venue dated March 28, 1990, filed with the Chancery Court For Knox County,

Tennessee. The Chancery Court For Knox County, Tennessee rejected the Petitioner's arguments and denied the Petitioner's motions for dismissal in its Orders of February 22, 1990, and June 22, 1990.

7. The Petitioner never appealed the decisions of the Chancery Court For Knox County, Tennessee, as to the propriety of venue under 15 U.S.C. § 1692i, to any higher Court in Tennessee.

8. Both the Tennessee Trial Court and the Colorado Trial Court found, based upon the facts of the case, that the Fair Debt Collection Practices Act did **not** apply to this case. These determinations have never been overturned on appeal.

IV. Even Were The Fair Debt Collection Practices Act Found To Apply To This Case, Its Application Would Not Void The Judgment.

1. The remedies for a breach of any section of the Fair Debt Collection Practices Act, including the venue provisions of section 15 U.S.C. § 1692i, are found in 15 U.S.C. § 1692k.

2. 15 U.S.C. § 1692k provides, in part:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

3. The remedies provided in 15 U.S.C. § 1692k involve monetary damages only. No where in 15 U.S.C. § 1692i, 15 U.S.C. § 1692k, or anywhere else in the Fair

Debt Collection Practices Act, does it state that a judgment which is entered in violation of 15 U.S.C. § 1692i is void. Had the Congress intended such a remedy, it would have provided such a remedy in the Act. Nor has the Petitioner cited any Court decisions which have held that a judgment which is entered in violation of section 15 U.S.C. § 1692i is void.

4. Cases have held, "By the overwhelming weight of authority, statutes relating to venue are held to be procedural merely, and not jurisdictional in the strict sense.", *Mutzig v. Hope*, 158 P.2d 110, 117 (Oregon Sup. Ct. 1945); "Further, improper venue does not otherwise amount to a jurisdictional defect making a default judgment void.", *Sisneros v. First Nat. Bank Of Denver*, 689 P.2d 1178, 1182 (Colo.App. 1984); "The filing of a case in the wrong county clearly does not deprive the trial court of jurisdiction to entertain the subject-matter.", *Pund v. Pund*, 357 N.E.2d 257, 259 (Indiana App. 1976); and, "Moreover, a court generally does not lack power to decide a case even though venue may be improper.", *Estate Of Owens*, 553 P.2d 700, 702 (New Mexico Sup. Ct. 1976).

5. A violation of 15 U.S.C. § 1692i, the venue provision of the Fair Debt Collection Practices Act, would have occured at the time that the Respondent's complaint was filed in the Chancery Court for Knox County, Tennessee, in 1989. Any action to enforce any liability resulting from said violation is now barred by 15 U.S.C. § 1692k(d) which provides:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without

regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

CONCLUSION

1. The Petitioner has not properly asserted the jurisdiction of the United States Supreme Court.

2. A case or controversy does not exist in this matter.

3. The Fair Debt Collection Practices Act does not apply to the facts in this case.

4. Even were the Fair Debt Collection Practices Act to apply to this case, the Tennessee Judgment would not be void.

The Petitioner's Petition For Writ Of Certiorari should, therefore, be denied.

Respectfully submitted,

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